

JUDGE CARTER

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

SHAWN GRAHAM, an individual,

Plaintiff,

v.

**RWTW, LLC,
KITH RETAIL, LLC,
NEW ERA CAP CO., INC.,
AMAZON.COM SERVICES, INC., and
SEARS HOLDINGS MANAGEMENT
CORPORATION**

Defendants.

18 CV 6812

Civil Action No.

JURY TRIAL DEMANDED

FILED
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
JUL 31 2018

**COMPLAINT FOR TRADEMARK INFRINGEMENT,
COPYRIGHT INFRINGEMENT, UNFAIR COMPETITION AND RELATED CLAIMS**

Plaintiff, Shawn Graham, alleges his complaint against Defendants, RWTW, LLC, Kith Retail, LLC, New Era Cap Co., Inc., Amazon.com Services, Inc., and Sears Holdings Management Corporation as follows:

NATURE OF THE ACTION

1. This action arises from Defendants infringement of Plaintiff's "ownership" and exclusive "use" rights in the marks, **RWTW®** and **ROLL WITH THE WINNERS®**, in conjunction with clothing, merchandise and other related goods and services. Despite Plaintiff being the senior user and owner of the trademarks **RWTW®** and **ROLL WITH THE WINNERS®** and offering various clothing, merchandise and online blog services related to entertainment and fashion under such brands name, the Defendants have infringed Plaintiff's rights in the aforementioned mark by manufacturing, printing, producing, promoting, selling, and offering for sale clothing items under Plaintiff's trademarks. Plaintiff has already experienced

“actual confusion” in connection with this matter and is likely to continue to experience confusion as to the affiliation or connection between all of the Defendants named in this action and Plaintiff resulting in the unjust enrichment of Defendants by using Plaintiff’s trademarks.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 15 U.S.C. §1051 *et seq.*, 15 U.S.C. Sections 1114-1116; under Section 43(a) of the Trademark Act, 15 U.S.C. §1125(a), Section 43(c) of the Trademark Act, 15 U.S.C. §1125(c) and 28 U.S.C. §1367.

3. This Court has personal jurisdiction over the Defendants because Defendants engage in continuous and significant business activities in, and directed to the State of New York within this judicial district and because Defendants have committed tortuous acts aimed at and causing harm within the State of New York and this judicial district. All of the Defendants are also registered with the New York State Division of Corporations.

4. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(b) and (c) because it is where Plaintiff resides and the Defendants transacts business in this district, and because a substantial portion of the events giving rise to the asserted claims have occurred, and continue to occur, within this district. Furthermore, the damage to Plaintiff and its intellectual property described herein continues to occur in this judicial district. Defendants also advertise, market and sell goods in this district via the internet or directly.

THE PARTIES

5. Plaintiff, Shawn Graham is an individual with an address at 222 E. 104th Street – Suite 901, New York, NY 10029.

6. Upon information and belief, Defendant RWTW, LLC is a New York Limited Liability Company with a principal place of business at 80 Franklin Street, New York, New York 10013.

7. Upon information and belief, Defendant Kith Retail, LLC is a New York Limited Liability Company with a principal place of business at 625 Broadway – 4th Floor, New York, New York 10012.

8. Upon information and belief, Defendant New Era Cap Co., Inc., is a New York corporation with a principal place of business at 160 Delaware Avenue, Buffalo, New York 14202.

9. Upon information and belief, Defendant Amazon.com Services, Inc. is a Delaware corporation with a principal place of business at 410 Terry Ave. N, Seattle, Washington 98109.

10. Upon information and belief Defendant Sears Holdings Management Corporation is a Delaware corporation with a principal place of business at 3333 Beverly Rd., Hoffman Estates, Illinois 60179.

FACTS

11. Plaintiff Shawn Graham, amongst other things, is a fashion designer who has also managed and operated an online blog regarding fashion and entertainment since at least as early as 2010.

12. Since at least as early as 2010, Plaintiff Shawn Graham has been selling headwear, t-shirts, sweaters, hooded sweatshirts and other clothing items under the **RWTW®** and **ROLL WITH THE WINNERS®** brand names.

13. Since at least as early as 2010, Plaintiff has been independently operating a clothing business under the trade name **RWTW CLOTHING CO.™**, which has sold headwear, t-shirts, sweaters, hooded sweatshirts and other related clothing items under the marks **RWTW®**

and **ROLL WITH THE WINNERS®**. The **RWTW®** mark represents and is an acronym for **ROLL WITH THE WINNERS®**.

14. Plaintiff uses the ®, and ™ symbols on product packaging materials, hang tags, and on promotional materials to put the public on constructive notice that Plaintiff is claiming trademark rights in the **RWTW®** and **ROLL WITH THE WINNERS®** brand names.

15. Plaintiff sells, and promotes the sale of his clothing via his website www.rollwiththewinners.net, and Plaintiffs clothing items are also available for sale in several retail locations.

16. Plaintiff advertises his **RWTW®** and **ROLL WITH THE WINNERS®** brands and clothing items through its blog and on social media platforms including but not limited to Instagram.

17. Plaintiff's **RWTW®** and **ROLL WITH THE WINNERS®** clothing products enjoys a superlative reputation in the apparel industry.

18. Plaintiff is the registered owner of United States Trademark Registration No. 5,017,855 for the mark **RWTW®**. (See Exhibit A).

19. Plaintiff is the registered owner of United States Trademark Registration No. 5,017,663 for the mark **ROLL WITH THE WINNERS®**. (See Exhibit B).

20. Plaintiff has built and acquired significant common law rights in the **RWTW®** and **ROLL WITH THE WINNERS®** marks in connection with clothing and merchandise based on Plaintiff's long standing and continuous use of the marks in commerce in connection with the promotion, sale and offering of clothing items under the aforementioned marks.

21. Upon information and belief, Defendant RWTW, LLC is an online and retail store clothing company that began its operations on March 6, 2014.

22. Defendant RWTW, LLC is manufacturing, printing, marketing, promoting, selling and offering for sale, apparel including t-shirts and caps bearing Plaintiff's **RWTW®** mark which violate Plaintiff's trademark rights in the aforementioned marks **RWTW®** and **ROLL WITH THE WINNERS®**. The aforementioned use in commerce by Defendant RWTW, LLC violates Plaintiff's exclusive use rights in connection with clothing.

23. Plaintiff is a senior user of the **RWTW®** and **ROLL WITH THE WINNERS®** marks in connection with clothing and has priority rights in the aforementioned marks by virtue of "first use" "in commerce."

24. Upon information and belief, Defendant RWTW, LLC had knowledge of Plaintiff's ownership rights in the **RWTW®** and **ROLL WITH THE WINNERS** marks in connection with the sale and offering of clothing items.

25. Defendant RWTW, LLC's use of Plaintiff's trademarks has already caused confusion and is likely to continue to cause confusion as to the source of clothing products and other merchandise under the **RWTW®** and/or **ROLL WITH THE WINNERS®** marks.

26. Defendant Kith Retail, LLC ("KITH"), operates a popular retail clothing chain that sells t-shirts, headwear, sneakers and various other clothing items from its various retail store locations and from its e-commerce clothing business at www.kithnyc.com.

27. Upon information and belief, Defendant KITH is manufacturing, printing, marketing, promoting, selling and offering for sale a headwear and other clothing items bearing Plaintiff's **RWTW®** and **ROLL WITH THE WINNERS®** marks from its website www.kithnyc.com and at its retail store locations that violate Plaintiff's trademark rights in the aforementioned marks.

28. Upon information and belief, Defendant KITH had knowledge of Plaintiff's ownership rights in the **RWTW®** and **ROLL WITH THE WINNERS®** marks and it has acted

in bad faith in adopting Plaintiff's trademarks on clothing items to palm of the good will and reputation Plaintiff has built in the **RWTW®** and **ROLL WITH THE WINNERS®** marks.

29. Defendant KITH's use in commerce of Plaintiff's trademarks has already caused confusion and is likely to continue to cause confusion as to the source of clothing products under the **RWTW®** and/or **ROLL WITH THE WINNERS®** marks.

30. Defendant New Era Cap Co., Inc. ("NEW ERA"), is one of the largest headwear retailers in the world and operates a headwear clothing business at www.neweracap.com and from various retail locations worldwide.

31. Upon information and belief, Defendant New Era is manufacturing, printing, marketing, promoting, selling and offering for sale a cap bearing Plaintiff's **RWTW®** and **ROLL WITH THE WINNERS®** marks from the KITH clothing retail locations and from the website www.kithnyc.com that violate Plaintiff's trademark rights in the aforementioned marks. (See Exhibit C).

32. Upon information and belief, Defendant NEW ERA had knowledge of Plaintiff's ownership rights in the **RWTW®** and **ROLL WITH THE WINNERS®** marks and it has acted in bad faith in adopting Plaintiff's trademarks on clothing items to palm of the good will and reputation Plaintiff has built in the **RWTW®** and **ROLL WITH THE WINNERS®** marks.

33. Defendant NEW ERA's use in commerce of Plaintiff's trademarks has already caused confusion and is likely to continue to cause confusion as to the source of clothing products under the **RWTW®** and/or **ROLL WITH THE WINNERS®** marks.

34. Defendant Amazon.com Services, Inc. ("Amazon.com") is an e-commerce business that is providing an online store and platform to purchase t-shirts and other apparel and are publishing, exploiting, marketing, promoting, selling and offering for sale via its website www.amazon.com, clothing items under designs that infringe Plaintiff's **RWTW®** and **ROLL WITH THE WINNERS®** marks. (See Exhibit D).

35. Defendant Amazon.com's continued use in commerce of Plaintiff's **RWTW®** and/or **ROLL WITH THE WINNERS®** marks is likely to continue to cause confusion as to the source of apparel products under the aforementioned marks.

36. Defendant Amazon.com's use of Plaintiff's **RWTW®** and **ROLL WITH THE WINNERS®** marks has already caused confusion and is likely to cause future and additional instances of confusion as to the source of clothing products under the **RWTW®** and/or **ROLL WITH THE WINNERS®** marks owned by Plaintiff.

37. Defendant Amazon.com's use of Plaintiff's trademarks is not considered a fair use as Amazon.com is using the marks for commercial business purposes and for a profit.

38. Defendant Amazon.com's infringement of Plaintiff's trademarks is willful as Amazon is aware of the infringing content it is continuing to display, sell and offer for sale from its www.amazon.com website.

39. Defendant Sears Holdings Management Corporation ("SEARS"), is a major retail chain and operates a clothing business at www.sears.com and from various retail locations worldwide.

40. Upon information and belief, Defendant SEARS is manufacturing, printing, marketing, promoting, selling and offering for sale a beanie hat bearing Plaintiff's **RWTW®** and/or **ROLL WITH THE WINNERS®** marks from the www.sears.com website that violate Plaintiff's trademark rights in the aforementioned marks. (See Exhibit E).

41. Upon information and belief, Defendant SEARS had knowledge of Plaintiff's ownership rights in the **RWTW®** and **ROLL WITH THE WINNERS®** marks and it has acted in bad faith in adopting Plaintiff's trademarks on clothing items to palm of the good will and reputation Plaintiff has built in the **RWTW®** and **ROLL WITH THE WINNERS®** marks.

42. Defendant SEARS's use in commerce of Plaintiff's trademarks has already caused confusion and is likely to continue to cause confusion as to the source of clothing products under the **RWTW®** and/or **ROLL WITH THE WINNERS®** marks.

43. Defendant SEARS's use of Plaintiff's trademarks is not considered a fair use as SEARS is using the marks for commercial business purposes and for a profit.

FIRST CAUSE OF ACTION
TRADEMARK INFRINGEMENT (15 U.S.C. §§ 1114-1116)

44. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 through 43 of this Complaint.

45. The use in commerce by Defendants of an identical version of Plaintiff's registered trademark is likely to cause confusion, mistake and deception among members of the public and in trade as to the source, origin, or sponsorship of defendants' goods and services. Such use by Defendants constitutes a clear and direct infringement of Plaintiff's rights in and to Plaintiff's registered trademark, and has resulted in injury and damage to Plaintiff that will continue if Defendants are not ordered to cease all use of the **RWTW®** and **ROLL WITH THE WINNERS®** marks.

SECOND CAUSE OF ACTION
UNFAIR COMPETITION & FALSE DESIGNATION OF ORIGIN (15 U.S.C. § 1125(a))

46. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 through 45 of this Complaint.

47. Plaintiff has the exclusive right to market, brand and provide clothing related goods using the **RWTW®** and **ROLL WITH THE WINNERS®** marks.

48. Defendants by reason of the aforementioned acts, have falsely described, represented and designated the origin of its goods and services. Defendants' activities already have confused the public into believing that Defendants and Plaintiff's clothing goods and accessories come from one and the same source, and Defendants continued activities are likely to create further confusion and deceive the public concerning the source of the goods/services.

49. Defendants have unfairly profited from the actions alleged herein and will continue to unfairly profit and become unjustly enriched unless and until such conduct is enjoined by this Court.

50. By reason of Defendants willful acts conducted in conscious disregard for Plaintiff's rights, Plaintiff is entitled to treble damages under 15 U.S.C. § 1117(a).

THIRD CAUSE OF ACTION COMMON LAW TRADEMARK INFRINGEMENT & UNFAIR COMPETITION

51. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 through 50 of this Complaint.

52. Defendants conduct constitutes deception by which Defendants goods will be palmed off as those of Plaintiff. Such conduct constitutes trademark infringement and unfair competition in violation of the laws of the State of New York.

53. Defendants unauthorized use of Plaintiff's **RWTW® and ROLL WITH THE WINNERS®** marks is likely to continue to cause further confusion to the public as to the clothing goods and accessories of the respective parties.

54. By reason of the foregoing, Defendants have infringed and continue to infringe on Plaintiff's common law rights in the **RWTW® and ROLL WITH THE WINNERS®** marks and Defendants have become unjustly enriched by such acts of infringement.

55. Defendants unlawful conduct has been and will continue to be willful or willfully blind to Plaintiff's rights, as Defendant has reason to know of Plaintiff's rights in the name and image of Plaintiff's deceased celebrity husband.

FOURTH CAUSE OF ACTION UNJUST ENRICHMENT

56. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 through 55 of this Complaint.

57. Defendants has\ve unjustly retained profits from the sale of clothing goods and accessories bearing Plaintiff's **RWTW® and ROLL WITH THE WINNERS®** marks.

58. Defendant's actions constitute unjust enrichment.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays for relief as follows:

1. Entry of an order and judgment requiring that all Defendants, its subsidiaries, officers, agents, servants, employees, owners, and representatives, and all other persons or entities in active concert or participation with them, be preliminarily and, thereafter, permanently enjoined and restrained from (a) using in any manner the trade name, trademark, domain name or other indicia or origin, including in whole or part the term **RWTW® and/or ROLL WITH THE WINNERS®**, or any colorable imitation thereof; (b) advertising, operating a website, using business stationery or offering any goods or services using the trade name, trademark, domain name, URL, or any other indicia of origin including in whole or part the term **RWTW® and/or ROLL WITH THE WINNERS®**, or any colorable imitation thereof; (c) otherwise engaging in any acts of unfair competition and infringement which tend to injure Plaintiff's rights in the **RWTW® and ROLL WITH THE WINNERS®** marks.

2. That Defendant be required to account to Plaintiff for any and all profits derived by it, and to compensate Plaintiff for all the damages sustained by reason of the acts complained of herein, and that the damages herein be trebled pursuant to the Trademark Act.

3. That Defendant be ordered to deliver up for destruction any and all infringing materials bearing the **RWTW®** and/or **ROLL WITH THE WINNERS®** marks, and any colorable imitation thereof, in whole or part.

4. That Plaintiff be awarded punitive damages against all Defendants.

5. That Defendant be required to place advertisements or send notifications to past and present customers that it improperly has been using the **RWTW®** mark.

6. That Plaintiff be awarded statutory damages in the amount of \$1,000,000.00 for Defendants acts of willful infringement of Plaintiff's trademarks.

7. That Defendant RWTW, LLC's trademark registration for the mark RWTW be cancelled or assigned to Plaintiff.

8. That Plaintiff be awarded the cost and disbursements of this action.

9. That Plaintiff have such other and further relief as the Court deems just and proper.

JURY DEMAND

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff hereby demands a trial by jury as to all issues.

Dated: July 30, 2018
New York, New York

Respectfully submitted,
Shawn Graham – Pro Se

A handwritten signature in cursive script that reads "Shawn Graham". The signature is written in black ink and is positioned above a horizontal line.

Shawn Graham
Pro Se Plaintiff
222 E. 104th Street – Suite #901
New York, New York 10029
(516) 967-1645

EXHIBIT A

United States of America

United States Patent and Trademark Office

RWTW

Reg. No. 5,017,855

Registered Aug. 09, 2016

Int. Cl.: 42

Service Mark

Principal Register

Graham, Shawn (UNITED STATES INDIVIDUAL)
2062 Strauss Street
Brooklyn, NY 11212

CLASS 42: Providing customized on-line web pages and data feeds featuring user-defined information, which includes blog posts, new media content, other on-line content, and on-line web links to other websites

FIRST USE 11-00-2010; IN COMMERCE 11-00-2010

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT STYLE, SIZE OR COLOR

SER. NO. 86-865,830, FILED 01-05-2016

JENNY K PARK, EXAMINING ATTORNEY



Michelle K. Lee

Director of the United States
Patent and Trademark Office

EXHIBIT B

United States of America

United States Patent and Trademark Office

ROLL WITH THE WINNER'S

Reg. No. 5,017,663

Registered Aug. 09, 2016

Int. Cl.: 42

Service Mark

Principal Register

Graham, Shawn (UNITED STATES INDIVIDUAL)
2062 Strauss Street
Brooklyn, NY 11212

CLASS 42: Providing customized on-line web pages and data feeds featuring user-defined information, which includes blog posts, new media content, other on-line content, and on-line web links to other websites

FIRST USE 11-00-2010; IN COMMERCE 11-00-2010

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT STYLE, SIZE OR COLOR

SER. NO. 86-862,827, FILED 12-31-2015

JENNY K PARK, EXAMINING ATTORNEY



Michelle K. Lee

Director of the United States
Patent and Trademark Office

EXHIBIT C



KITH

8 0(0)

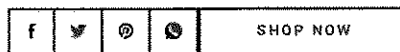
HOME / NEWS / KITH X RWTW X NEW ERA 59FIFTY - KING CAPSULE

KITH X RWTW X NEW ERA 59FIFTY - KING CAPSULE

BLOG POST JUNE 22, 2016



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Kith has partnered RWTW (Roll With the Winners) and industry-leading headwear brand New Era to create two special 59FIFTY caps. Offered in Burgundy and Black, both styles feature a rich full grain leather crown and brim. The front logo is an amalgamation of *W* and *U*s to properly represent both brands, and is created from a two-tone chrome plate of rose gold and silver. Additional branding can be seen in contrast embroidery on the right side and rear, bearing RWTW and Kith respectively.

The Kith x RWTW x New Era 59FIFTY - King Capsule is a Kith-exclusive, and is only available at Kith Manhattan, Kith Brooklyn, and [Kith Chicago](#). Limited to 72 units each, both hats are priced at \$100 USD.

EXHIBIT D



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Rwtw
RWTW T SHIRT - Roll With The Winners T Shirt
 Be the first to review this item
 Price: \$15.99 & **FREE Shipping** on eligible orders. [Details](#)
 Free Return on some sizes and colors

Fit Type: Men
[Men](#) [Women](#) [Youth](#)

Color: Black

Size:
[Select](#) [Size Chart](#)

- Solid colors: 100% Cotton; Heather Grey: 90% Cotton, 10% Polyester; All Other Heathers: 50% Cotton, 50% Polyester
- Imported
- Machine wash cold with like colors, dry low heat
- Funny RWTW T SHIRT - Roll With The Winners T Shirt
- RWTW T SHIRT - Roll With The Winners T Shirt
- Lightweight, Classic fit, Double-needle sleeve and bottom hem

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100% Cotton Bandanas

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Product description

Package Dimensions: 10 x 8 x 1 inches

Shipping Weight: 4.8 ounces (View shipping rates and policies)

ASIN: B07FN5NF63

EXHIBIT E

Sears

Home / Fitness & Sports / Fan Shop / Team Apparel / Men's /

RWTW Logo Roll With The Winner Knit Beanie Toque Cuffed Brand Wining Gray Hat

Temporarily
unavailable



add to list

Description Item # SPM9422113722 Model # BRAND1878

This knit features RWTW embroidered on front panel. RWTW embroidered on back panel. Authentic RWTW Merchandise. Officially Licensed Product.

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